Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-75.

ROBERT H. LUCAS,

Petitioner,

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.m.B.H. & CO. K.G.

v.

NORTHERN METAL CO.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Respondent, Northern Metal Co., respectfully prays that Lucas' Petition for Writ of Certiorari be denied.

QUESTIONS PRESENTED.

1. Was Lucas' appeal to the Court of Appeals from an Order of the United States District Court for the Eastern District of Pennsylvania which denied his Motion to Strike an affirmative defense pleaded by Brinknes an appeal from a final Order as required by 28 U. S. C. A. § 1291?

2. Do the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act exceed the power of Congress or limit the admiralty jurisdiction of the federal courts?

STATEMENT OF THE CASE.

Robert H. Lucas, petitioner herein, filed a complaint in the United States District Court for the Eastern District of Pennsylvania against "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. and Co., K.G., alleging that he sustained injuries while working aboard the S/S BRINKNES as a longshoreman on January 26, 1973. Causes of action based on unseaworthiness and on negligence were set forth in the complaint.

Brinknes filed a third-party complaint against Northern Metal Co., which, at the time of the accident described in Lucas' complaint, was Lucas' stevedore-employer. Northern Metal filed a motion to dismiss the third-party action, alleging that said action was barred by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 905(b), as amended in October, 1972. The District Court granted Northern Metal's motion on August 5, 1974.

Lucas then moved, in the District Court, to strike an affirmative defense asserted by Brinknes that the cause of action based on unseaworthiness was barred by the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U. S. C. A. § 901 et seq.). This motion was denied by an Order of the District Court dated December 30, 1974. The Court, at the same time, denied motions by Brinknes for reconsideration or for certification for immediate appeal of its Order of August 5, 1974, which dismissed the third-party complaint which Brinknes had filed against Northern Metal.

Lucas moved, pursuant to 28 U. S. C. A. § 1292(b), to certify for immediate appeal the Order of the District Court which denied its motion to strike Brinknes' affirmative defense. The motion for certification was denied in an Order of the District Court dated January 21, 1975.

The District Court, in the same Order, denied motions by Brinknes for certification and for reconsideration for certification of the Court's Order of August 5, 1974, dismissing Brinknes' third-party complaint.

Lucas thereafter appealed to the United States Court of Appeals for the Third Circuit from the dismissal of his motion to strike Brinknes' affirmative defense. The Court of Appeals, on motion of Brinknes, supported by Northern Metal, dismissed Lucas' appeal in an order dated April 28, 1975.

ARGUMENT.

I. The Order Dismissing Lucas' Motion to Strike Brinknes' Affirmative Defense That Lucas' Cause of Action Based on Unseaworthiness Is Barred by the Longshoremen's and Harbor Workers' Compensation Act Is Not a Final Order and the Court of Appeals Was Correct in Dismissing Lucas' Appeal From Said Order.

Lucas bases his petition for certiorari on 28 U. S. C. A. § 1291, which provides that Courts of Appeals shall have jurisdiction of appeals from all "final" decisions of the District Courts of the United States. The Order of the District Court refusing to strike Brinknes' affirmative defense, however, is not a final order within the meaning of 28 U. S. C. A. § 1291. Lucas himself recognized that the Court's Order was not final when he moved for certification of that Order for immediate appeal pursuant to 28 U. S. C. A. § 1292(b), which establishes special provisions for appealing orders "not otherwise appealable" which involve controlling questions of law as to which there is substantial ground for difference of opinion. The District Court denied the motion for certification and it was only then that Lucas claimed that the District Court's Order refusing to strike Brinknes' affirmative defense was a final order which could be appealed pursuant to 28 U. S. C. A. § 1291. The Order of the District Court is not a final order for purposes of appeal and the refusal of the Court of Appeals to hear Lucas' appeal from that Order was proper.

In *Gillespie v. United States Steel Corp.*, 379 U. S. 148, 13 L. Ed. 2d 199 (1964), cited by Lucas in support of his contention that the District Court's Order in the instant case was final, the Court of Appeals and this Court

affirmed dismissal by a District Court of the plaintiffs' cause of action for unseaworthiness. This is clearly and obviously different from refusal to strike an affirmative defense. In *Gillespie*, a cause of action was eliminated from the case prior to trial; in the instant case, all issues have been preserved as a result of the decision of the District Court. All issues in the present case having been preserved for subsequent determination, the District Court's Order is not final.

Moreover, the complaint in *Gillespie* was filed by the mother of a deceased seaman, as administratrix of his estate, to recover for herself and for the decedent's dependent brother and sisters. The brother and sisters were not entitled to a Jones Act recovery while their mother was living; the court's decision to strike the claims based on unseaworthiness from the complaint therefore completely eliminated the brother and sisters from the litigation arising out of their brother's death. The Court stated at page 153 of its opinion:

> . . . [D]elay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them [citation omitted], there certainly is ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition for extraordinary relief. [Citations omitted.]

Lucas' claims for recovery, in the instant case, have not been cut off by the District Court's refusal to strike

Brinknes' affirmative defense. His claim based on Brinknes' negligence is unaffected by the District Court's ruling or by the refusal of the Court of Appeals to hear an appeal from that ruling at the present time.

The District Court declined, on Lucas' petition, to certify for immediate appeal its Order refusing to strike Brinknes' affirmative defense and the Court of Appeals, on Brinknes' motion which was supported by Northern Metal, struck Lucas' appeal from that Order. Two courts have concluded that an appeal from the District Court's refusal to strike an affirmative defense set forth by Brinknes does not lie at the present time. Lucas has not provided any basis for a contrary determination by this Court. The Order of the District Court is interlocutory and, as the Court of Appeals held, it cannot be appealed pursuant to 28 U. S. C. A. § 1291.

II. The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act Neither Exceed the Authority of Congress Nor Narrow the Admiralty Jurisdiction of the Courts.

The issue of the constitutionality of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act raised by Lucas in his petition cannot properly be placed before this Court by an appeal from the refusal by the District Court to strike Brinknes' affirmative defense that Lucas' cause of action based on unseaworthiness is barred by the Act, as amended. Moreover, it is clear that enactment of the amendments did not exceed Congress' authority or limit the admiralty jurisdiction of the federal courts.

Lucas argues that the provisions of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act which eliminate the longshoremen's

judicially-created unseaworthiness remedy are an unconstitutional narrowing of the maritime jurisdiction of the courts. In support of this proposition, he relies on dicta in the numerous cases, upholding the power of Congress to change admiralty law by legislation, which purport to prohibit congressional action affecting the maritime jurisdiction of the courts. The case law does not support Lucas' reasoning nor the conclusion he seeks to draw from it.

The language from *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 68 L. Ed. 748 (1923) cited by Lucas for the proposition that the maritime jurisdiction of the courts may not be altered by legislation is belied by the result in that case and the results of the numerous other cases upholding congressional modification of substantive maritime law which significantly altered the maritime jurisdiction of the courts. In *Panama*, this Court upheld the provisions of the Jones Act, which substantially increased the rights and remedies of injured seamen, despite appellant's argument that the Act was unconstitutional because it was destructive of the admiralty and maritime jurisdiction of the courts of the United States.

It cannot be contended that the Supreme Court has acquiesced to an extension of its jurisdiction only to accomplish humanitarian objectives. The Limitation of Liability Act of 1851 (9 Stat. at L. 635 Ch. 43, 46 U. S. C. § 182) was enthusiastically upheld despite the fact that it substantially limited the remedies of libellants, seamen included, against shipowners, and thus narrowed the maritime jurisdiction of the courts. The limitation of liability of shipowners was upheld although it was a concept created by Congress and not by the general maritime law. *National Steam Navigation Co. v. Dyer*, 105 U. S. 24, 26 L. Ed. 1001 (1882).

In *Butler v. Boston and Savannah Steamship Co.*, 130 U. S. 527, 32 L. Ed. 1017 (1889), this Court considered the genesis and legality of the Limitation of Liability Statute before affirming its constitutionality. It stated at page 555:

> The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is coextensive, in its operation, with the whole territorial domain of that law. [Citations omitted.] In *The Lottawanna* we said: "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power if no other, to introduce such changes as are likely to be needed." p. 577 [663]. . . . In *The Scotland* this language was used: "But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which through the Act of Congress, we have announced that we propose to administer justice in maritime cases." p. 31 [1003]. Again, in the same case, p. 29, we said: "But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawanna*, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law."

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These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our Maritime Code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. [Citation omitted.] But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted.

In *Detroit Trust Co. v. Steamer "Thomas Barlum"*, 293 U. S. 21, 79 L. Ed. 176 (1934), this Court stated at page 43:

> When the Constitution was adopted, the existing maritime law became the law of the United States "subject to power in Congress to modify or supplement it as experience or changing conditions might require." *Panama R. Co. v. Johnson*, 264 U. S. 375, 385-387, 68 L. ed. 748, 752, 753, 44 S. Ct. 391.

The provisions of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act which have been challenged by Lucas do not offend the judicial power of this Court over maritime matters. The language cited by Lucas from the case of *Panama Railroad Co. v. Johnson, supra,* merely reiterates the Constitutional mandate that the maritime jurisdiction of the Court be immune from congressional modification. The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act do not alter that jurisdiction. Those Amendments merely withdraw from longshoremen a judicially-created remedy against the shipowner for breach of a warranty of seaworthiness. They do not disturb the warranty of seaworthiness as it relates to others, but merely prohibit its invocation in favor of injured longshoremen as an integral part of the revised compensation scheme created by Congress. Congress' modifications of the substantive maritime law do not change the admiralty jurisdiction of the courts.

The observations of Mr. Justice Bradley in *Rodd v. Heartt,* 88 U. S. 558, 22 L. Ed. 654 (1875), are helpful to an understanding of the role of the courts in construing legislative schemes affecting the maritime law. He stated at page 576:

> But we must always remember that the court cannot make the law; it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the Legislative Department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.

The traditional admiralty and maritime jurisdiction extending the power of the federal courts to all cases involving navigable waters remains unchanged by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Congress merely rewrote a portion of the substantive admiralty law to be applied and construed by the federal courts in the exercise of their jurisdictional power. That Congress has the constitutional power to amend the substantive maritime law is not controverted. Indeed, the courts have uniformly recognized the constitutional power of Congress in a changing world to update admiralty law. It must be concluded, therefore, that the changes effected by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are a lawful exercise of that power.

CONCLUSION.

Dismissal by the United States District Court for the Eastern District of Pennsylvania of Lucas' Motion to Strike Brinknes' affirmative defense that Lucas' claim based on unseaworthiness is barred by the Longshoremen's and Harbor Workers' Compensation Act is an interlocutory Order. The District Court's ruling does not constitute a final order from which an appeal can be taken pursuant to 28 U. S. C. A. § 1291. The United States Court of Appeals for the Third Circuit properly dismissed Lucas' appeal from the District Court's Order.

A petition for certiorari from dismissal of an appeal of a District Court Order refusing to strike an affirmative defense is not a proper means for bringing before this Court the issue of the constitutionality of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. If the Court should elect to consider the

constitutionality of the Amendments to the Act, it is respectfully submitted that said Amendments are constitutional. Congress has the authority to modify or supplement the general maritime law as experience or changes in conditions require. Its passage of amendments to the Longshoremen's and Harbor Workers' Compensation Act in 1972 was clearly within that authority. Congress has not, in any respect, limited the traditional admiralty jurisdiction of the federal courts.

Respectfully submitted,

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